

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

HAWAII DISABILITY RIGHTS
CENTER, in a representative capacity
on behalf of its constituents,

Plaintiff,

vs.

CHRISTINA KISHIMOTO, in her
official capacity as Superintendent of
the State of Hawai'i, Department of
Education; and PANKAJ BHANOT, in
his official capacity as Director of the
State of Hawai'i, Department of
Human Services,

Defendants.

Civ. No. 18-00465 LEK-RLP

**DECLARATION OF LOUIS
ERTESCHIK**

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I, LOUIS ERTESCHIK, declare:

1. I am the Director of the Hawai'i Disability Rights Center
("**HDRC**"), the Plaintiff in this case on behalf of its constituents, who are children
and young adults with autism spectrum disorder ("**Autism**") under the age of 22 in
Hawai'i, and their parents or guardians (hereinafter, "**Plaintiff**"). I am also an
attorney licensed to practice law in Hawai'i and co-counsel for HDRC in this case.

2. I make this Declaration based on my personal knowledge and I am competent to testify as to the matters set forth below.

3. The HDRC was established in 1977 and is the designated Protection and Advocacy (“**P&A**”) System for the State of Hawai`i, and it is authorized by the United States Congress to defend and enforce the human, civil and legal rights of people with disabilities and to protect them from discrimination. *See Hawai`i Revised Statutes §333F-8.5.*

4. Congress mandated the P&A System under seven different federal laws: (1) Protection & Advocacy for Individuals with Assistive Technology, 29 USC §3004 (PAAT); (2) Protection & Advocacy for Beneficiaries of Social Security, 42 USC §1320b-21 (PABSS); (3) Protection & Advocacy for Individuals with Developmental Disabilities, 42 USC §15001 (PADD); (4) Protection & Advocacy for Individuals with Mental Illness, 42 USC §10801 (PAIMI); (5) Protection & Advocacy for Individual Rights, 20 USC §794e (PAIR); (6) Protection & Advocacy for Individuals with Traumatic Brain Injury, 42 USC §300d-53 (PATBI); (7) Protection & Advocacy for Voter Access, 52 USC §21061 (PAVA). The P&A System was recently updated to add a new program from the Social Security Administration to protect beneficiaries of representative payees.

5. The policy of HDRC is to advocate for as many people with disabilities in the State of Hawai`i, on as wide a range of disability rights issues

and to resolve rights violations and also provide full legal representation to protect the rights of people with disabilities.

6. A goal of HDRC is to advance the civil and legal rights of people with disabilities. HDRC achieves this goal by, among other things, advocating for disabled individuals against acts, or failures to act, which result in their physical, psychological or financial harm or death; assisting in gaining access to employment, public facilities, programs, services, and transportation; promoting people with disabilities to live freely by enjoying the opportunities to experience personal growth, to work, to contribute to society, and to be accepted and recognized for their abilities; helping people with disabilities gain independence, productivity, integration, and inclusion; and training people with disabilities to make choices for themselves and to demonstrate their own competence.

7. For example, in 2016, HDRC served a total of 21,691 people in the State of Hawai'i. The HDRC also defended the rights of 300 people in individual cases, specifically regarding education.

8. The HDRC engages in the following activities to accomplish its objectives: outreach, provision of information, referral assistance, education; training; individual case work advocacy; and systemic casework and advocacy, including legal activities on behalf of people with disabilities.

9. HDRC's functional membership consists of individuals with disabilities, including their families, who are the beneficiaries of HDRC's services, activities, and advocacy.

10. The constituents of the HDRC include children and young adults with autism spectrum disorder ("**Autism**") in Hawai'i, and their parents or guardians, which are the constituents for whom this case is being brought.

11. The minors K.K.T, K.N.T., G.C., G.M. J.V., D.C., J.R., and E.W., through their parents Naomi Tachera, Christine Cosio, Gracie McComas, Allison Villiarimo, Sheryl Cunningham, Maile Rogers, and Jeanette White, respectively, who have submitted testimony in support of HDRC's *Motion for Preliminary Injunction* in this case are constituents of HDRC and most have directly utilized HDRC's advocacy and resources.

12. Issues regarding the means and methods by which treatments and services are provided to children and young adults with Autism in Hawai'i and the process their parents endure to obtain access to such treatments and services are categorically germane to the HDRC's mission as a P&A, whose very mandate is to protect the interests of people with disabilities living in the State of Hawai'i.

13. In 2014, the HDRC partnered with and engaged the law firm of Alston Hunt Floyd & Ing ("**AHFI**") to challenge the State of Hawai'i Department of Human Services ("**DHS**") policy regarding coverage of medically necessary

Applied Behavioral Analysis services (“**ABA**”) for children and young adults with Autism under the early and periodic screening, diagnostic and treatment mandate of the Medicaid Act (“**EPSDT**”). *See J.E. v. DHS*, 1:14-cv-00399-HG-KJM (2014) (the “**Egan Case**”).

14. At that time, the Hawai`i Medicaid program did not cover ABA services for children and young adults with Autism, despite their clear obligation to do so pursuant to EPSDT when it was determined to be medically necessary for an individual.

15. Around the same time, to address the growing problem of unqualified persons purporting to administer ABA in Hawai`i, I advocated in favor of a State law regarding the licensure of Behavior Analysts during the 2015 session of the Hawai`i State Legislature.

16. In mid-2015, the Legislature passed, and the Governor approved SB40 CD1 (Act 199), regarding the licensure of Behavior Analysts, which has been codified as HRS Chapter 465D (the “**Licensure Law**”).

17. In August 2016, this Court in the Egan Case recognized DHS’s failure to notify persons eligible for EPSDT of the fact that DHS now recognized ABA as a covered treatment for Autism under the state Medicaid program, and ordered DHS to do so.

18. Following the Egan Case, constituents of HDRC increasingly reported that medically necessary ABA services were being covered by Medicaid for EPSDT recipients.

19. The Egan Case had focused on DHS's violation of EPSDT by not covering ABA in the Medicaid program, however, there remained an urgent and unmet need for ABA in the educational setting in State of Hawai'i Department of Education ("**DOE**").

20. I continued to receive numerous reports from constituents that Medicaid was not covering and/or providing medically necessary ABA during school hours because DOE was supposed to provide ABA to students in school.

21. The HDRC and AHFI exchanged correspondence and even met with the State of Hawai'i Attorneys General in an effort to resolve this issue without the need for litigation.

22. The State of Hawai'i Attorneys' General insisted that DOE was providing adequate educational services for its Autistic students and that DOE did not have to provide ABA by licensed professionals because it was exempt under the ABA Licensure Law. Nonetheless, the Attorneys' General represented that they had discussed the issue with DHS, DOE, and even the State of Hawai'i Department of Health ("**DOH**"). They made assurances that the departments were working together to meet their respective legal requirements regarding ABA.

23. I continued to receive complaints from constituents that DOE was not providing ABA for students during school hours, even if the services were recommended by a licensed physician and approved for coverage by Medicaid or a private healthcare plan.

24. I became aware that DOE used its IDEA obligations as an excuse not to allow the provision of medically necessary ABA services on campus.

25. I was told by HDRC constituents that DOE flatly rejected requests from parents that the public schools accommodate medically necessary ABA services for its students with Autism.

26. If DOE simply allowed ABA providers on campus to provide medically necessary ABA to its students with Autism, the services would be paid for by either Medicaid or private insurance.

27. I continued to meet with legislators and representatives from the relevant State departments to address this issue, with little progress.

28. I continued to receive complaints from constituents that the DOE was refusing to include ABA in individualized education plans (“IEPs”), even when the services were recommended by a behavioral health professional for a child with Autism. I also heard that DOE, in some cases, even refused to recognize an Autism diagnosis for students. In my opinion, this is illegal predetermination which affects all constituents with Autism as a blanket policy.

29. I worked closely with AHFI during the summer of 2017 on this issue. AHFI, in conjunction with HDRC, held an informational session for parents and other individuals in the community who had concerns regarding DOE's handling of ABA services in schools.

30. I advocated on behalf of HDRC for these parents, but DOE continued to insist that it provided ABA services if its IEP team determined that such services were needed for a particular student. DOE also insisted that its special education teachers and "autism consultants" were qualified to prepare plans for and administer such ABA services.

31. I am aware of a few situations where DOE has included ABA in a child's IEP. However, all of the situations I am aware of are the result of persistent parent advocacy and, often related to a settled due process proceeding. With regard to ABA services, DOE's practice has been to not include such services in a child's IEP and, rather, force a due process lawsuit for those services which often intimidates parents enough to stop pushing for the services. If a parent has the time and resources available to show up and participate in the due process hearing, DOE often settles and concedes to include some ABA services in an IEP.

32. During the 2018 State Legislative Session I continued to advocate on behalf of the HDRC's constituents. I continued to report to AHFI

regarding the status and advising on the likely need for a lawsuit to effectuate compliance with the law.

33. I also continued to meet with stakeholders on this issue.

34. Around February 2018, I learned of a memorandum issued by DOE's Superintendent, which stated that DOE's efforts to provide ABA in schools and obtain school-based funding was still a work in progress.

35. The 2018 State Senate passed a Resolution to establish a working group examining how DOE can maximize Medicaid reimbursement for support services offered to eligible students during school hours. I submitted testimony in support of the Resolution, but noted my worry that DOE would treat the working group as a substitute for an action plan to provide ABA services to children with Autism in schools.

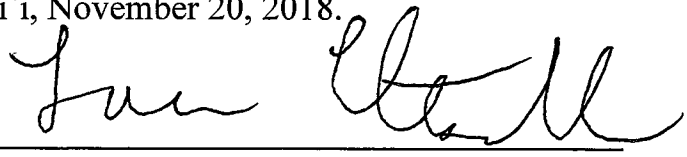
36. As the 2018 State Legislative session came to a close, I advised AHFI (now, Dentons US LLP) that a lawsuit would likely be required to prevent ongoing irreparable harm to these students with Autism, because it did not look like DOE or DHS would actually resolve these issue by the start of the 2018-2019 academic school year.

37. I continued to meet with stakeholders on this issue during the summer of 2018 and continued to be advised that the departments were working on the issues.

38. To date, I am not aware that either DOE or DHS have resolved this issue. I continue to receive complaints from constituents that students with Autism are unable to receive the ABA services they need during school.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawai'i, November 20, 2018.



LOUIS ERTESCHIK